United Malayan Banking Corp v Chen Yin Khee & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–382 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
13 OCTOBER 2004

Banking — Guarantee and indemnity — Proof of indebtedness — Whether bank officer's sole testimony on indebtedness sufficient proof — Whether account must be produced — Whether accumulation of interests must be explained

Civil Procedure — Trial — Submission of no case to answer — Defendant did not cross-examine plaintiff's witness or led any evidence — Whether tantamount to abandoning defence — Whether procedurally wrong to make submission of no case to answer

The appellant had granted an additional fixed loan facility of RM200,000 to the company based on a continuing guarantee and indemnity provided by the respondents, the directors of the company. The appellant then sued to recover the loan sum. The High Court dismissed the appellant's claim on the ground that it had failed to prove the amount due under the guarantee and indemnity. SP1, the only bank officer called by the appellant testified that both the company and the respondents had made no payment towards the additional loan. However, she did not produce any account to establish the amount due from the respondents. SP1 also did not explain how the initial claim had accumulated to more than sevenfold.

Held, dismissing the appeal with costs:

(1) There were only scanty and unsatisfactory evidence as proof of indebtedness (see para 8). As this was a money claim based on accounts kept by the appellant, particulars of which were strenuously disputed by the respondents it was of utmost importance that the appellant produce all the accounts to establish the respondent's liabilities. If the accumulation to more than sevenfold of the initial sum was as a result of overdue interest, the amount of such overdue interest should have been stated and proven by way of the appellant's accounts (see para 9). Added to this was the absence of evidence as to whether the proceeds of sale of the charged property had been utilized to offset the amount due, which would surely affect the respondents' liabilities under the guarantee and indemnity (see para 10).

(2) The fact that the second respondent did not cross-examine the appellant's only witness or led any evidence could not be taken as an act of abandoning his defence as at the stage of the appellant's case the burden of proof lies with the appellant and since it had failed to produce any prima facie evidence to establish the second respondent's indebtedness, he was not expected to fill in the gaps in the appellant's claim. The second

respondent committed no procedural wrong by submitting no case to answer at the end of the appellant's case and electing to produce no evidence to support his defence (see para 11).

[**Bahasa Malaysia summary**

Perayu telah memberi kemudahan pinjaman tetap tambahan sebanyak RM200,000 kepada syarikat berdasarkan kepada jaminan berterusan dan tanggung rugi yang diberikan oleh responden-responden, pengarah-pengarah syarikat tersebut. Perayu kemudian memulakan tindakan saman untuk mendapat kembali jumlah pinjaman. Mahkamah Tinggi menolak tuntutan perayu-perayu atas alasan bahawa ia gagal untuk membuktikan jumlah wang yang kena dibayar di bawah jaminan dan tanggung rugi tersebut. SP1, satu-satunya pegawai bank yang dipanggil oleh perayu untuk memberi keterangan menyatakan bahawa kedua-dua syarikat dan responden-responden tidak membuat sebarang bayaran balik terhadap pinjaman tambahan tersebut. Walau bagaimanapun, beliau tidak mengemukakan sebarang akaun untuk membuktikan jumlah yang kena dibayar oleh responden-responden. SP1 juga tidak menerangkan bagaimana tuntutan pertama boleh berkumpul menjadi lebih dari tujuh kali ganda.

Diputuskan, menolak rayuan dengan kos:

(1) Keterangan mengenai keberhutangan terlalu sedikit dan tidak memuaskan (lihat perenggan 8). Memandangkan ini adalah satu tuntutan wang berdasarkan akaun yang disimpan oleh perayu yang mana butir-butirnya disangkal oleh responden-responden, ianya amat penting bagi perayu untuk mengemukakan kesemua akaun untuk membuktikan liabiliti responden-responden. Jika pengumpulan sehingga lebih dari tujuh kali ganda adalah kerana faedah yang lampau tempoh, jumlah faedah yang lampau tempoh itu haruslah dinyatakan dan dibuktikan melalui akaun-akaun perayu (lihat perenggan 9). Tambahan lagi, ketiadaan keterangan mengenai sama ada hasil dari jualan harta yang digadai telah digunakan untuk ditolak dengan jumlah yang kena dibayar, yang semestinya memberi kesan kepada liabiliti responden-responden di bawah gerenti dan tanggung rugi tersebut (lihat perenggan 10).

(2) Fakta yang responden kedua tidak memeriksa balas satu-satunya saksi perayu atau mengemukakan sebarang keterangan tidak boleh dikatakan sebagai satu perbuatan yang mengabaikan pembelaannya kerana pada tahap kes perayu beban bukti adalah pada perayu dan oleh kerana ia gagal untuk mengemukakan sebarang keterangan prima facie untuk membuktikan keberhutangan responden kedua, beliau tidak boleh diharap untuk mengisi ruang-ruang di dalam tuntutan perayu. Responden kedua tidak melakukan sebarang kesilapan prosedur kerana mengemukakan tidak ada kes untuk dijawab pada akhir kes perayu dan memilih untuk tidak

mengemukakan sebarang keterangan untuk menyokong pembelaannya (lihat perenggan 11).]

Notes

For cases on guarantee and indemnity, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1788–1793.

For cases on no case to answer, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6454–6463.

For guarantees, see 16 *Halsbury's Laws of Malaysia* paras [270.003]–[270.062].

Cases referred to

Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)

Appeal from: Civil Suit No D1–23–577 of 1988 (High Court, Kuala Lumpur)

Damian Lim (Chin & Rakan-Rakan) for the first respondent.
Hira Singh (Brian Cummings with him) (Asbir, Hira Singh & Co) for the appellant.
Loo Shin Mun (Shinmun & Assoc) for the second respondent.

Siti Norma Yaakob JCA (delivering judgment of court):

[1] We had dismissed this appeal with costs and we now give our reasons for arriving at that decision.

[2] The appellant's cause of action against the respondents is on a continuing guarantee and indemnity dated 20 September 1985, being one of the two securities provided by the respondents for an additional fixed loan facility of RM200,000 granted by the appellant to M/s Chai Foo Sdn Bhd ('the company'). The respondents were the directors of the company at the material time and the other security provided was a second legal charge over land belonging to the company.

[3] The High Court dismissed the appellant's claim on the ground that it had failed to prove the amount due under the guarantee and indemnity. As such the only issue before us was whether the sum claimed by the appellant had been proven. This must be reflected in the evidence both oral and documentary adduced at the trial.

[4] The proof of indebtedness came from SP1, the only bank officer called by the appellant and apart from stating that she had knowledge of the loan involved also testified that both the company and the respondents made no payment towards the additional loan. She then produced the guarantee and indemnity that was executed by the respondents and two notices of demand

that were separately sent to them. She concluded her examination-in-chief by stating the amount due as at the date of her testimony.

[5] When cross-examined by the first respondent she revealed that the appellant had granted two facilities to the company but the respondents were sued in respect of the second additional facility of RM200,000.

[6] The second respondent did not cross-examine her and neither offered any evidence on his behalf. As such, the sum total of the appellant's case rested on SP1's testimony in her examination-in-chief and cross-examination. She did not produce any account to establish the amount due from the respondents.

[7] It is not disputed that the land charged to the appellant had already been sold by public auction but there is no evidence to show whether the proceeds of sale had been utilized to offset the amounts due from either of the two loans.

[8] It was in the light of such scanty and unsatisfactory evidence that the High Court dismissed the appellant's claim and we entirely agree.

[9] As this is a money claim based on accounts kept by the appellant, particulars of which are strenuously disputed by the respondents it is of utmost importance that the appellant produce all the accounts to establish the respondent's liabilities. This is more so when the amount claimed in the statement of claim is for RM248,377.65 as at 13 August 1987, but at the date of trial, the amount had arisen to RM804,255.82 and SP1 had not explained how the initial claim had accumulated to more than sevenfold. If the accumulation was as a result of overdue interest the amount of such overdue interest should have been stated and proven by way of the appellant's accounts. This was not done, and the sum of RM804,255.82 has not been substantiated. See the case of *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

[10] Added to this is the absence of evidence as to the utilization of the proceeds of sale of the charged property. This is a very relevant piece of evidence for if such proceeds had been utilized to offset the company's liability for the second fixed loan, it would surely affect the respondents' liabilities under the guarantee and indemnity.

[11] The fact that the second respondent did not cross-examine the appellant's only witness or led any evidence cannot be taken as an act of abandoning his defence as at the stage of the appellant's case the burden of proof lies with the appellant and since it had failed to produce any prima facie evidence to establish the second respondent's indebtedness, he is not expected to fill in the gaps in the appellant's claim. The second respondent committed no procedural wrong by submitting no case to answer at the end of the appellant's case and electing to produce no evidence to support his defence.

[12] For the reasons that appear in this judgment, we see no reason to interfere with the High Court's decision and we had accordingly dismissed this appeal with costs and ordered that the deposit be paid out to the first respondent to account of his taxed costs.

Appeal dismissed.

Reported by Loo Lai Mee